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No. 80-1765

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,
Petitioner,

v.

HYDROLEVEL CORPORATION,
Respondent.

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION OF ENGINEERING SOCIETIES IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Preliminary Statement

The American Association of Engineering Societies, Inc. ("AAES") is a non-profit membership corporation organized solely for scientific, educational and charitable activities in the public interest. As an association enjoying tax exempt status under §501(c)(3) of the Internal Revenue Code, the sole function of AAES is to serve the public by helping to develop an understanding of the technological considerations which have increasingly become part of various public policy decisions. By galvanizing the diverse expertise of its more than 38 member societies representing approximately 850,000 engineers, AAES has come to play an increasingly active role in discharging the re-

sponsibilities of engineers to advise the public and elected officials on technology and related issues of the day.

For more than forty (40) years, AAES,* its predecessor organizations, and its constituent societies have fulfilled their public interest work at no cost to the public through the "exploitation" of the talents of thousands of dedicated volunteers. Now, due to the decision of the United States Court of Appeals for the Second Circuit in *Hydrolevel Corporation* v. *The American Society of Mechanical Engineers*,** the ability of AAES, its member societies and other non-profit membership corporations to offer these increasingly important services to the public has been called into question.

While Petitioner, the American Society of Mechanical Engineers ("ASME"), has a direct pecuniary interest in the outcome of the *Hydrolevel* case, AAES and the other non-profit societies that make up its membership have a transcending interest in the decision of this Court to grant or refuse ASME's Petition for a Writ of Certiorari—the ability of non-profit membership corporations to continue to utilize the services of volunteers to perform their public interest work.

Statement of the Case

The narrow question presented by the instant Petition is whether, or to what extent, ASME may be held liable for treble damages under the antitrust laws for the improper and wholly unauthorized acts of two volunteers who, totally

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* In December, 1979, the Engineer's Joint Council ("EJC") changed its name to AAES. EJC had previously been serving the public for more than forty (40) years and enjoyed tax exempt status since 1961.

** Dkt. Nos. 79-7254 ando 79-7260, decided November 24, 1980.

unbeknownst to ASME but using ASME procedures, sought to benefit their own commercial employers at the expense of a competitor. In deciding that a non-profit membership corporation may be held liable for treble damages for the acts of disloyal volunteers who acted without authority and against their principal's interests, the lower court has, in our judgment, promulgated a sweeping rule of law that is not only at odds with prior decisions of this Court and other courts of appeal, but is entirely inconsistent with the long established public policy of encouraging the efforts of non-profit associations serving the public interest through the work of volunteers. Accordingly, this *amicus curiae* brief is submitted solely to address this important issue of public policy.

The Facts

The facts of this case have been presented at length in ASME's Petition and are adopted for the purposes of this brief.

Reasons for Granting the Writ

Simply stated the decision below if left to stand unexplained, will have a profound chilling effect on many, if not all, non-profit membership corporations which, of necessity, rely in good faith upon the work of their many volunteers. By ruling that a non-profit membership corporation may, under certain unspecified circumstances, be held vicariously liable for the unauthorized acts of its volunteer-agents, even where the acts at issue are taken without prior knowledge or approval and where they are not taken to advance the interests of the membership corporation, the Court of Appeals has created a "sword of Damocles" (the spector of treble damage liability) which is so threatening that

many such public service organizations may simply not be able to afford the risk of continuing to utilize the services of volunteers and will, therefore, have to discontinue rendering invaluable services to the public.

POINT ONE

The Decision Below Creates a Rule of Law That Is Against Long Established Public Policy and Will Have a Disastrous Effect on Non-Profit, Voluntary Membership Organizations.

While holding that a non-profit membership corporation may be held liable under the antitrust laws for acts of volunteers which are neither authorized, intended to benefit the organization or even consistent with the corporation's purposes, the Court of Appeals has, in effect, made these public interest corporations "insurers" of the good faith of their volunteers. Since these non-profit organizations must rely primarily on the work of volunteers, this ruling, which is not only inconsistent with prior decisions of this Court and of other courts of appeal, if left to stand, will do nothing less than require non-profit corporations such as AAES and the nearly 850,000 engineers represented by its member societies to cut back on the broad spectrum of services they have traditionally provided to our society. Clearly, this decision extending the doctrine of vicarious liability and holding for our society these important public policy considerations should not go unreviewed by this Court.

As stated, the decision by the Second Circuit has broken new ground in expanding the concept of vicarious liability under the antitrust laws. However, by imposing liability on corporate principals for the acts done by an agent under

his "apparent authority" the lower court has disregarded the basic principle long ago enunciated by this Court that participation in a conspiracy requires, at the least, a "unity of purpose or a common design and understanding, or a meeting of minds in an unlawful agreement." *American Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946). While corporations have long been held "responsible for the wrongs committed by its agents in the course of its business", this Court has required that before a corporation may be held liable for the acts of its agents ". . . it must be shown that (the act complained of) is in the business of the corporation." *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U.S. 344, 395 (1922).

Indeed, in applying the ruling of *Coronado Coal* and explaining the rationale for holding a corporation criminally liable for the acts of its agents, the Ninth Circuit Court of Appeals has noted that antitrust violations are usually motivated by a desire to enhance profits; commonly involve large, complex, and highly decentralized corporate business enterprises; and more often than not, involve the implementation, over an extended period of time, of basic policy decisions. *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1006 (9th Cir. 1972), *cert. den.* 409 U.S. 1125 (1973).

By extending the rule of vicarious liability to cover acts done by agents under "apparent authority", the Court of Appeals has not only run afoul of the decision by this Court in *Coronado Coal, supra*, but has imposed treble damage antitrust liability on a corporation whose policies are not only *not* profit oriented but whose very existence as a tax exempt "501(c)(3)" membership corporation rests upon its performance of scientific, educational and charitable services *in the public interest*. In sharp contrast to the decision in *Hilton Hotels, supra*, where the Ninth Circuit

recognized that vicarious liability of a corporation was justified by the fact that antitrust violations are usually the result of the implementation of basic policy decisions, the acts here involved were not the result of basic policy decisions, but were, in fact, the result of a total and unauthorized perversion of the basic policies of the corporate principal.*

The case for restricting the imposition of corporate liability for those acts of agents which are either expressly authorized or at least taken to advance the purposes of the corporate principal is clear with regard to the instant matter. ASME, AAES and other non-profit membership corporations must by reason of their charters and tax exempt status limit their activities to scientific, educational and charitable functions. While the very nature of these restrictions compels these organizations to rely on the work of volunteers, it has also allowed them to perform important public services at no cost to the public. For example, the very code which is at the heart of the instant case has been established through the efforts of volunteers and has been responsible for the virtual elimination of heating boiler explosions.

Other services provided to society by non-profit membership corporations are simply too many to enumerate. Not only does AAES utilize the services of more than 600 individual volunteers to staff its more than forty (40) committees, but the constituent societies of AAES employ the

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* Indeed, in holding the Hilton Corporation liable for the act of its agent, the Ninth Circuit specifically noted that:

> "A purpose to benefit the corporation is necessary to bring the agent's acts within the scope of his employment." *Standard Oil Co.* v. *United States*, 307 F.2d 120, 128-129 (5th Cir. 1962).

In the instant case, it is conceded that the conspirators had no intention of benefiting ASME.

services of thousands of volunteers, all expressly limited by the charters of member organizations to educational, scientific or charitable activities. The contributions of non-profit membership corporations, however, go much beyond those of the engineering societies—bar associations, medical associations, accountants organizations and community planning boards, to name just a few, have historically mobilized billions of dollars of manpower and talent for the benefit of the general public. These many associations have played important roles in improving public safety and product reliability, maintaining high ethical and professional standards for the various professions and providing for the dissemination of information necessary to the increasing quality of our lives.

If AAES, its member societies and other non-profit membership corporations are forced to choose between exposing themselves to the devastating consequences of treble damage antitrust liability or cutting back on the utilization of volunteers, with the concommitant diminution of services rendered to the public, the choice is clear—services will have to be cut back. The consequences to American society of such a decision are profound indeed. We have historically opted to have voluntary non-profit professional associations monitor the standards of admission to the practice of many of our professions. Do we now wish to turn back those responsibilities to government? In an age of increasing reliance on engineering and technology, do we wish to have the government undertake the herculean and costly responsibility for promulgating and interpreting codes and standards? Clearly, society has in the past been well served by allowing the private sector to discharge these responsibilities—all through the acts of volunteers.

This is not to say that non-profit organizations should be immune from suit. Quite the contrary. Each of these or-

ganizations have responsibilities to monitor reasonably the activities of its volunteers. Nevertheless, it is simply unrealistic to expect these organizations to detect every possible disloyal volunteer before he acts. What is necessary is a balancing of priorities. Indeed, this Court has previously articulated a perfectly workable rule which recognizes the need to foster volunteerism on the one hand while holding such organizations properly accountable for acts of their volunteers taken to advance the interests of the organization. Thus, in the second *Coronado Coal* case, this Court refused to hold a union liable for acts encouraged by its president and held that:

> "In our previous opinion we held that a trades-union, organized as effectively as this United Mine Workers' organization was, might be held liable, and all its funds raised for the purpose of strikes might be levied upon to pay damages suffered through illegal methods in carrying them off; *but certainly, it must be clearly shown in order to impose such a liability on an association of 450,000 men that what was done was done by their agents in accordance with their fundamental agreement of association.*" *Coronado Coal* v. *United Mine Workers of America*, 268 U.S. 295, 304 (1925) (emphasis added).

This principle applied to a labor union, that a large organization may only be held responsible for acts taken to benefit the organization, should be applied to non-profit membership corporations. As in the case of labor unions, non-profit membership corporations serve important public functions which must be recognized by our courts. By applying the test of "apparent authority" to the instant case, the lower court has, in our view, unwisely failed to recognize the need to balance these competing interests.

CONCLUSION

For the foregoing reasons, the Petition for a *Writ of Certiorari* should be granted.

Respectfully submitted,

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